NO. 86-1034

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

COMMONWEALTH OF VIRGINIA,
Appellant,

v.

AMERICAN BOOKSELLERS ASSOCIATION, INC., *ET AL.*,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE APPELLANT

MARY SUE TERRY
Attorney General of Virginia

*RICHARD B. SMITH
Assistant Attorney General

MARK R. DAVIS
Assistant Attorney General

101 North Eighth Street
Richmond, Virginia 23219
(804) 786-6564
Counsel for Appellant

**Counsel of Record*

ALPHA GRAPHICS, INC. • WASHINGTON, D.C. • (202) 331-8101

QUESTIONS PRESENTED

1. Does Plaintiffs' failure to allege and show that they displayed any material in violation of Virginia's 1985 juvenile display provision deprive a federal court of Article III jurisdiction?

2. Given the contrived nature of Plaintiffs' preemptive attack on Virginia's statute and the paucity of their evidence, do federal-state comity concerns outweigh any interest in allowing Plaintiffs to litigate the legal rights and interests of others not before the Court?

3. Should Virginia's 1985 juvenile display provision be totally and absolutely invalidated even though it is not substantially overbroad on its face and is readily susceptible to narrowing constructions if necessary?

PARTIES BELOW

The appellants in the court of appeals were the Commonwealth of Virginia by her Attorney General and William K. Stover, Chief of Police for Arlington County, Virginia. The appellees were the American Booksellers Association, Inc., the Association of American Publishers, the National Association of College Stores, Inc., Books Unlimited, Inc., of Arlington, Virginia and Ampersand Books of Alexandria, Virginia.

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED i
TABLE OF AUTHORITIES iv
OPINIONS BELOW 1
JURISDICTION 1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2
STATEMENT OF THE CASE 5
SUMMARY OF THE ARGUMENT 8
ARGUMENT:
I. Plaintiffs Lack Standing To Attack The Amendment 11
A. There Is No Article III Case Or Controversy Before The Court 12
B. This Court Should Deny Prudential Standing To These Plaintiffs 16
II. The Amendment Is Not Facially Overbroad 17
A. Introduction 17
B. Facial Overbreadth: The Standard 20
C. Facial Overbreadth: Application To The Amendment 22
1. The Amendment Serves Compelling State Interests 23
2. The Amendment Does Not Substantially Deter Protected Expression 24
a. Retailers' Ability to Operate Is Not Impaired 26
b. Adult Access Is Not Deterred 31
c. "Older Minors" Access: A Non-Issue 32
3. Narrowing Constructions Are Readily Available 34
D. The Amendment Is A Valid Time, Place and Manner Regulation 38
CONCLUSION 39

TABLE OF AUTHORITIES
CASES

Page

American Booksellers Ass'n, Inc. v. *Commonwealth of Virginia*, 802 F.2d 691 (4th Cir. 1986) ..... *Passim*

American Booksellers Association, Inc. v. *Rendell*, 332 Pa. Super. 537, 481 A.2d 919 (1984) 24,30,31,34

American Booksellers Association v. *Strobel*, 617 F. Supp. 699 (E.D. Va. 1985) 6,24

American Booksellers Association v. Webb, 590 F. Supp. (N.D. Ga.) 1984) 34

Babbitt v. *United Farm Workers National Union*, 442 U.S. 289 (1979) 12,17

Bolger v. *Youngs Drug Products Corp.*, 463 U.S. 60 (1983) 21

Broadrick v. *Oklahoma*, 413 U.S. 601 (1973) 21,22,24,27 34,35,37

Brockett v. *Spokane Arcades, Inc.*, 472 U.S. 491 (1985) 20,21

Butler v. *Michigan*, 352 U.S. 380 (1957) 9,18,32

Capitol News Co., Inc. v. *Metro Gov't, etc.*, 562 S.W. 2d 430 (Tenn. 1978) 37

Commonwealth v. *Ellett*, 174 Va. 403, 4 S.E.2d 762 (1939) 36

Corn Products Ref. Co. v. *FTC*, 324 U.S. 726 (1945) 36

Erznoznik v. *City of Jacksonville*, 422 U.S. 205 (1975) 20,21,25,34

FCC v. *Pacifica Foundation*, 438 U.S. 726 (1978) 20,26

Freeman v. *Virginia*, 223 Va. 301, 288 S.E. 2d 461 (1982) 28,30,33

Ginsberg v. *New York*, 390 U.S. 629 (1968) ..... *Passim*

Grayned v. *City of Rockford*, 408 U.S. 104 (1972) 35
Greyhound Corp. v. *Excess Insurance Co. of America*, 233 F.2d 630 (5th Cir. 1956) 36
Hamling v. *United States*, 418 U.S. 87 (1974) 10,30,33
Hunt v. *Washington State Apple Advertising Commission*, 432 U.S. 333 (1977) 14
Interstate Circuit v. *Dallas*, 390 U.S. 676 (1968) 26
Jacobellis v. *Ohio*, 378 U.S. 184 (1964) 19
Jenkins v. *Georgia*, 418 U.S. 153 (1974) 28
Miller v. *California*, 413 U.S. 15 (1973) 17,19,20,21
Mishkin v. *New York*, 383 U.S. 502 (1966) 18
M.S. News v. *Casado*, 721 F.2d 1281 (10th Cir. 1983) 23,31
New York v. *Ferber*, 458 U.S. 747 (1982) ..... *Passim*
O'Shea v. *Littleton*, 414 U.S. 488 (1974) 15
Pinkus v. *United States*, 436 U.S. 293 (1978) 33
Price v. *Commonwealth*, 214 Va. 490, 201 S.E.2d 798, *cert. denied*, 419 U.S. 902 (1974) 36
Rabe v. *Washington*, 405 U.S. 313 (1971) 20
Renton v. *Playtime Theatres Inc.*, ___ U.S. ___, 106 S.Ct. 925, 89 L.Ed 2d 29 (1986) 11,38,39,40
Rizzo v. *Goode*, 423 U.S. 362 (1976) 16,17
Screws v. *United States*, 325 U.S. 91 (1945) 34
Secretary of State of Maryland v. *J.H. Munson Co.*, 467 U.S. 947 (1984) 11,12,14,15,16
Shuttlesworth v. *Birmingham*, 382 U.S. 87 (1965) 37
Smith v. *California*, 361 U.S. 147 (1959) 31
Stanley v. *Georgia*, 394 U.S. 557 (1969) 19
State v. *Settle*, 90 R.I. 195, 156 A.2d 921 (1959) 19
Stefannelli v. *Minard*, 342 U.S. 117 (1951) 16
United States v. *Raines*, 362 U.S. 17 (1960) 11
United States v. *Reidel*, 402 U.S. 351 (1971) 20
Upper Midwest Booksellers v. *City of Minneapolis*, 780 F.2d 1389 (8th Cir. 1985) 21,23,32

Village of Hoffman Estates v. *Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982) 20,22,27,37
Warth v. *Seldin*, 422 U.S. 490 (1975) 11,17
Wooley v. *Maynard*, 430 U.S. 705 (1977) 16,17
Young v. *American Mini Theatres, Inc.*, 427 U.S. 50 (1976) ..... *Passim*
Zeigler v. *Zeigler*, 632 F.2d 535 (5th Cir. 1980) 35

CONSTITUTIONAL PROVISIONS

Article III, Section 2, of the United States Constitution 2,8,9,11,12,14,17
First Amendment to the United States Constitution ..... *Passim*
Fifth Amendment to the United States Constitution 2,5
Fourteenth Amendment to the United States Constitution 2,5

FEDERAL STATUTES

28 U.S.C. § 1254(2) 1
28 U.S.C. § 2201 2,5
28 U.S.C. § 2202 2,5
28 U.S.C. § 2403(b) 5
42 U.S.C. § 1983 2,5
42 U.S.C. § 1988 7

VIRGINIA STATUTES

Section 18.2-390 of the Code of Virginia ..... *Passim*
Section 18.2-391 of the Code of Virginia ..... *Passim*

LAW REVIEWS

Comment, *See No Evil: The Divisive Issue of Minors' Access Laws*, 17 Cumb. L. Rev.____(1987)..... 24

OTHER AUTHORITIES

Minneapolis Star and Tribune, January 6, 1986 23

NO. 86-1034

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

COMMONWEALTH OF VIRGINIA,
Appellant,

v.

AMERICAN BOOKSELLERS ASSOCIATION, INC., *ET AL.*,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE APPELLANT

OPINIONS BELOW

The district court's opinion is reported at 617 F. Supp. 699 and appears in the Jurisdictional Statement Appendix at pages A-15 through A-30. (J.S. at A-15 to A-30). The corrected modified panel opinion of the Court of Appeals is reported at 802 F.2d 691 and appears at pages A-1 through A-12 of the Jurisdictional Statement Appendix. (J.S. at A-1 to A-12).

JURISDICTION

The Court of Appeals' modified opinion was rendered on September 30, 1986. Virginia filed her notice of appeal on October 9, 1986, and her Jurisdictional Statement on December 24, 1986. This Court noted probable jurisdiction on February 23, 1987. ___ U.S. ___, 107 S.Ct. 1281. The Court's jurisdiction rests upon 28 U.S.C. § 1254(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article III, Section 2, of the United States Constitution states in pertinent part: "The judicial power shall extend to all cases, in law and equity, arising under this Constitution. . . ."

2. The First Amendment to the United States Constitution states in pertinent part: "Congress shall make no law ... abridging the freedom of speech." The Fifth and Fourteenth Amendments to the United States Constitution state in pertinent parts:"No person shall be . . . deprived of life, liberty, or property, without due process of law."

3. The relevant federal statutes are 28 U.S.C. § 2201 and § 2202, commonly called the declaratory judgment statutes, and 42 U.S.C. § 1983. (J.S. at A-41).

4. The relevant Virginia statutes are § § 18.2-390 and 391 of the Code of Virginia. They read, with the pertinent 1985 amendment to § 18.2-391 emphasized, as follows:

Virginia Code § 18.2-390

Definitions.—As used in this article:

(1) "Juvenile" means a person less then eighteen years of age.

(2) "Nudity" means a state of undress so as to expose the human male or female genitals, pubic area or buttocks with less than a full opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple, or the depiction of covered or uncovered male genitals in a discernibly turgid state.

(3) "Sexual conduct" means actual or explicitly simulated acts of masturbation, homosexuality, sexual intercourse, or physical contact in an act of apparent sexual stimulation or gratification with a person's clothed or unclothed genitals, pubic area, buttocks or, if such be female, breast.

(4) "Sexual excitement" means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

(5) "Sadomasochistic abuse" means actual or explicitly simulated flagellation or torture by or upon a person who is nude or clad in undergarments, a mask or bizarre costume, or the condition of being fettered, bound or otherwise physically restrained on the part of one so clothed.

(6) "Harmful to juveniles" means that qualilty of any description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sadomasochistic abuse, when it (a) predominately appeals to the prurient, shameful or morbid interest of juveniles, (b) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for juveniles, and (c) is, when taken as a whole, lacking in serious literary, artistic, political or scientific value for juveniles.

(7) "Knowingly" means having general knowledge of, or reason to know, or a belief or ground for belief which warrants further inspection or inquiry of both (a) the character and content of any material described herein which is reasonably susceptible of examination by the defendant, and (b) the age of the juvenile, provided however, that an honest mistake shall constitute an excuse from liability hereunder if the defendant made a reasonable bona fide attempt to ascertain the true age of such juvenile.

* * *

Virginia Code § 18.2-391

Unlawful acts.—(a) It shall be unlawful for any person knowingly to sell or loan to a juvenile, *or to knowingly display for commercial purpose in a manner whereby juveniles may examine and peruse:*

(1) Any picture, photograph, drawing, sculpture, motion picture film, or similar visual representation or image of a person or portion of the human body which depicts sexually explicit nudity, sexual conduct or sadomasochistic abuse and which is harmful to juveniles, or

(2) Any book, pamphlet, magazine, printed matter however reproduced or sound recording which contains any matter enumerated in paragraph (1) of this subsection, or explicit and detailed verbal descriptions or narrative accounts of sexual excitement, sexual conduct or sadomasochistic abuse and which, taken as a whole, is harmful to juveniles.

(b) It shall be unlawful for any person knowingly to sell to a juvenile an admission ticket or pass, or knowingly to admit a juvenile to premises whereon there is exhibited a motion picture, show or other presentation which, in whole or in part, depicts sexually nudity, sexual conduct or sadomasochistic abuse and which is harmful to juveniles or to exhibit any such motion picture at any such premises which are not designed to prevent viewing from any public way of such motion picture by juveniles not admitted to any such premises.

(c) It shall be unlawful for any juvenile falsely to represent to any person mentioned in subsection (a) or subsection (b) hereof, or to his agent, that such juvenile is eighteen years of age or older, with the intent to procure any material set forth in subsection (a), or with the intent to procure such juvenile's admission to any motion picture show or other presentation, as set forth in subsection (b).

(d) It shall be unlawful for any person knowingly to make a false representation to any person mentioned in subsection (a) or subsection (b) hereof or to his agent, that he is the parent or guardian of any juvenile, or that any juvenile is eighteen years of age, with the intent to procure any material set forth in subsection (a), or with the intent to procure such juvenile's admission to any motion picture, show or other presentation, as set forth in subsection (b).

(e) Violation of any provision hereof shall constitute a Class 1 misdemeanor.

STATEMENT OF THE CASE

The American Booksellers Association and its fellow plaintiffs ("the Plaintiffs") challenge *in toto* the 1985 amendment to § 18.2-391 of the Code of Virginia ("the Amendment"). The Amendment makes it unlawful to knowingly display for commercial purposes pornography that is obscene for children, but not adults, where children can examine and peruse it. The material covered by the Amendment is precisely the same material whose sale to juveniles has for years been proscribed by the pre-existing statute.

Virginia's display provision became law on July 1, 1985. Two weeks later, an array of trade associations, bookstores and individuals filed a complaint in the United States District Court for the Eastern District of Virginia attacking its constitutionality. The plaintiffs named Charles T. Strobel, Director of Public Safety for the City of Alexandria, and William K. Stover, Chief of Police for Arlington County, as defendants; neither Strobel, Stover nor any other official in the Commonwealth of Virginia had taken any steps to enforce the Amendment.

The suit was based on 42 U.S.C. § 1983, 28 U.S.C. §§ 2201 and 2202 and the First, Fifth and Fourteenth Amendments to the United States Constitution. The Plaintiffs asked for a declaratory judgment that the Amendment was unconstitutional and sought injunctive relief. (J.A. 12-22). The Plaintiffs filed three affidavits in support of their complaint: the affiants were Helen G. Ross, who operates Ampersand Books in Alexandria, Virginia, Carol Johnson, who manages Books Unlimited, Inc. in Arlington, Virginia, and Heather Florence, Vice President and General Counsel of Bantam Books, from Connecticut. (J.A.23-32).

Finding that the complaint called into question the constitutionality of a State statute affecting the public interest, the district court ordered that the Attorney General of Virginia be given the opportunity to intervene on behalf of the Commonwealth of Virginia pursuant to 28 U.S.C. § 2403(b). (J.S. at A-34). The Attorney General of Virginia accepted the court's invitation and intervened in the action on July 26, 1985. (J.S. at A-36).

After briefing the issues presented, the parties appeared before the district judge to argue the defendants' motions to dismiss the complaint. Over Virginia's objection, the district court allowed Ross, Johnson and Florence to supplement their affidavits orally. Their testimony included Ross' statement that she did not know Virginia's definition of "harmful to juveniles," having never read the applicable definitional statute that had been Virginia law for years. (J.A. 56). She had never refused to sell a book to a juvenile because "the matter has never arisen." (J.A. 58).

Heather Florence testified that she was a Connecticut resident and, before the Plaintiffs' complaint was filed, was not aware that Virginia even had a "harmful to juveniles" law. (J.A. 61-62). She had never considered whether material was "harmful to juveniles" because her employer does not retail books. (J.A. 62). Florence could not say which material would be affected by the Amendment because she did not understand what "harmful to juveniles" meant under Virginia law. (J.A. 61).

Carol Johnson testified that she "arbitrarily" decides whether to sell a particular book to a juvenile. (J.A. 67-68). Johnson did not know there was a legal definition of "harmful to juveniles" under Virginia law: "I guess I assumed there was, but I hadn't read it." (J.A. 75). She had no idea what percentage of her inventory appealed predominantly to the prurient interest of juveniles: "[E]ven guessing, it would be a very small percentage." (J.A. 77).

The district court rendered its judgment and opinion on September 10, 1985. The court found that an actual case or controversy existed and that it should not abstain from adjudicating the case because it involved a First Amendment issue with no unclear question of State law. The court proceeded to hold that the Amendment was overbroad on its face and that it was not a valid time, place and manner restriction. Defendants Strobel and Stover were accordingly permanently enjoined from enforcing the Amendment that they had never even contemplated enforcing. *American Booksellers Association v. Strobel*, 617 F.Supp. 699, 703-707 (E.D. Va. 1985)(J.S. at A-15 to A-30).

The prevailing Plaintiffs thereafter applied for an award of costs and attorney fees under 42 U.S.C. § 1988 in the amount of $17,035.77. The district court concluded, however, that it was equitable to let the costs "lie where they land" and denied the Plaintiffs' request for fees, finding that the Plaintiffs' action was a "carefully orchestrated attack on a Virginia statute," an "assault" which had been "masterminded" by the bookselling industry. (J.A. 83-84).

After briefing and oral argument, a panel of the United States Court of Appeals for the Fourth Circuit rendered an opinion on June 12, 1986. The panel affirmed the district court's judgment that the Amendment was facially overbroad, but reversed the district court's refusal to grant attorney fees.

Defendant Stover, who had argued on appeal that the Plaintiffs had no standing to sue him, petitioned for rehearing with a suggestion for rehearing *en banc*. The Court of Appeals refused Stover's rehearing petition on September 26, 1986, by a vote of six to four, one judge having disqualified himself. (J.S. at A-13). Four days later, however, the panel issued a modified opinion. The court concluded that there was "little specific evidence presented below" to allow a determination of the amount of material affected by the Amendment. The court nevertheless affirmed the district court's conclusion that the Plaintiffs had standing to attack the Amendment, that the Amendment was overbroad on its face and that it was not a valid time, place and manner regulation. The Court of Appeals reiterated that the State was liable for the Plaintiffs' attorney fees, but this time affirmed the district court's decision releasing the local defendants from fee liability. *American Booksellers Ass'n, Inc. v. Commonwealth of Virginia*, 802 F.2d 691, 693-697 (4th Cir. 1986).

SUMMARY OF THE ARGUMENT

The Court of Appeals' judgment totally invalidating Virginia's 1985 juvenile display provision should be reversed because Plaintiffs failed to show the existence of an Article III case or controversy, and their contrived and artificial attack on the Amendment should not give them prudential standing to assert speculative claims of others not before this Court. Even if the Plaintiffs properly stood before this Court, Virginia's juvenile display provision is not overbroad on its face.

(1) Section 18.2-391 of the Code of Virginia has constitutionally barred the sale to children of sexually explicit material that is "harmful to juveniles", but not necessarily obscene for adults, for almost two decades. *See Ginsberg v. New York*. And Virginia's 1985 amendment to this statute did nothing more than make it illegal to knowingly display this very *same* material where children can examine and peruse it at their leisure.

This Court has repeatedly emphasized the jurisdictional requisite that a federal plaintiff present an actual case or controversy for adjudication; this Article III requirement holds as true for a First Amendment claim as for any other. These Plaintiffs, however, showed no such actual dispute involving the Amendment, launching instead a preemptive attack on the provision within two weeks of its effective date based on their speculative, irrational fears of what they perceived or at least claimed to have perceived—the Amendment's effect to be.

Only two booksellers presented any evidence as to the Amendment's supposed impact, and they hadn't the faintest idea as to which material the Amendment even applied. There was simply no evidence or a finding by either court below that any Plaintiff, or anyone else for that matter, had violated the Amendment, was violating it, or intended to violate it in the future by displaying "harmful to juveniles" material where children could examine and peruse it. Even assuming that a minuscule amount of a Plaintiff's merchandise fell within the Amendment's purview, Plaintiffs still failed to show an actual case or controversy: although it has been illegal for years to sell this very *same* material to children in Virginia, both booksellers who testified admitted that their past business practices had prompted no contact whatsoever with law enforcement officials; in fact, both of Plaintiffs' bookstore witnesses indicated their personal agree-

ment that children should not have access to harmful sexually explicit material.

(2) Even if these Plaintiffs are found to have presented an Article III case or controversy, they should be restricted to an adjudication of only *their* rights and interests, not the conjectural ones of others not before the Court. Prudential standing is not a matter of right; it is a matter of judicial self-governance that was implicitly exercised in Plaintiffs' favor by both courts below despite the dearth of evidence and the district court's recognition that the attack on Virginia's juvenile display provision was a "carefully orchestrated" and "masterminded" assault. When confronted with such a contrived attack on a two-week old State statute as presented here, this Court's normally relaxed prudential standing rules for First Amendment litigants should give way to the federal-state comity considerations the Court has consistently acknowledged as of "special importance."

(3) In *Ginsberg*, this Court acknowledged the States' "transcendent interest" in protecting children from exposure to pornography. And in *New York v. Ferber*, the Court found it "evident beyond the need for elaboration" that this interest is "compelling." This same interest underlies Virginia's display provision because a child is harmed by his or her *exposure* to pornography, regardless of how that exposure occurs. After all, what good is a *Ginsberg*-like proscription on the sale of pornography to children if it is displayed where they can still examine and peruse it? Whether a child buys pornography, rents it, or simply stands in a store and reads it, the harm to him is exactly the same.

While serving a legitimate and compelling interest, Virginia's Amendment at the same time allows the dissemination of the regulated material to adults: it simply requires that the material not be knowingly displayed where children can examine and peruse it. The ability of adults to have ultimate access to the material differentiates the Amendment from provisions such as the one found unconstitutional in *Butler v. Michigan*, and it is this balance that makes Virginia's provision consistent with the approach suggested by this Court on several occasions.

A facial attack claims that the statute is absolutely and totally void in all its applications. This Court has therefore consistently

admonished that facial invalidation for overbreadth is "manifestly strong medicine" to be used only as a last resort; and just because there are potential impermissible applications, facial invalidation is not required where a case-by-case analysis can obviate difficulties in construction.

A statute's overbreadth must be *real* and *substantial;* even then, it is still not voidable unless narrowing constructions are not readily available to State courts. The Amendment is not substantially overbroad for two reasons: first, the Plaintiffs showed, if anything, only a minimal impact on a bookseller's right to sell and an adult's right to obtain this material; second, the Amendment only regulates material that this Court has found can be constitutionally proscribed as to children. The only way that absolutely protected expression can be swept within the Amendment's ambit is through a merchant's uninformed and irrational reaction to the provision.

The Court of Appeals' misperception of the Amendment's substantial overbreadth is emphasized by that court's critical misreading of the provision's scienter element: a scienter requirement does not, as the Fourth Circuit found, demand that merchants review each item they stock to determine if it is covered by the Amendment; to the contrary, it actually relieves a bookseller of this obligation. *See Ginsberg v. New York; Hamling v. New York.*

Just as fatal to the lower court's analysis is its expansive reading of the Amendment, ignoring the much narrower meanings of the provision's terms which a Virginia court would be required to use. For example, the Court of Appeals read the word "may" literally so as to mean "conceivably" or "might," when, in fact, the context of "may" in the Amendment means a reasonable certainty or actual tendency.

The Fourth Circuit also found the Amendment deficient because it does not list specific methods of compliance. But the Amendment's terms and the definitions it uses are admittedly not vague, so the inclusion of specific modes of compliance is not necessary. All that is constitutionally required is that a statute plainly tell what it makes illegal and this the Amendment does.

The Court's further finding that the Amendment is not an appropriate time, place and manner regulation because it in-

volves the "content of the regulated speech" is similarly misplaced. The Amendment does concern the content of expression, but only to the extent that to be subject to the Amendment's requirements sexually explicit material must be "harmful to juveniles." The provision does not attempt to regulate the speech itself, and this is the hallmark of any permissible time, manner and place restriction such as the ones validated by this Court in *Young v. American Mini Theatres* and, more recently, in *Renton v. Playtime Theatres.*

ARGUMENT

I. PLAINTIFFS LACK STANDING TO ATTACK THE STATE STATUTORY AMENDMENT

This Court has established a two-step inquiry to determine whether a litigant has the requisite standing to proceed before a federal court. First, a plaintiff must satisfy the Article III requirement that he present the court with an actual case or controversy by showing that he suffers a realistic possibility of criminal prosecution or other "injury-in-fact." This Article III inquiry goes directly to the court's jurisdiction to adjudicate an asserted dispute. *Secretary of the State of Maryland v. J.H. Munson Co.*, 467 U.S. 947 (1984); *Warth v. Seldin*, 442 U.S. 490 (1975)

Without an actual case or controversy between the parties, there exists no need to examine the second prong of the standing inquiry. If a case or controversy exists, however, then the court must determine whether the party before it has standing to assert the particular legal rights and interests presented for adjudication. This second step inquiry, known as prudential standing, is a matter of judicial self-governance, designed as a practical limitation on the court's adjudicative authority:

> The limitation [that a plaintiff generally must assert his own legal rights and interests] "frees the Court not only from unnecessary pronouncement on constitutional issues, but also from premature interpretations of statutes in areas where this constitutional application might be cloudy," *United States v. Raines*, 362 U.S., at 22, and it assures the court that the issues before it will be concrete and sharply presented. [Footnote omitted].

Munson, 467 U.S. at 955; *see also Warth*, 422 U.S. at 500.

A. THERE IS NO ARTICLE III CASE OR CONTROVERSY BEFORE THE COURT

The Amendment proscribes the knowing commercial display of material deemed harmful to juveniles in a manner permitting juveniles to examine and peruse the restricted matter. The material affected by the Amendment is precisely the same as that which is properly forbidden for sale to juveniles by the pre-existing statute. *See Ginsberg v. New York*, 390 U.S. 629 (1968).

Neither the bookstore owners who testified at the hearing, nor either lower court, paused to consider what material actually fell within the statutory prohibition. Instead, the entire case has proceeded upon the mere assumption that one of the two Plaintiff bookstores or an unidentified member of one of the trade associations displayed material violative of the Amendment. In *Babbitt v. United Farm Workers National Union*, 442 U.S. 289 (1979), this Court succinctly summarized the issues germane to determining whether an actual case or controversy exists: the plaintiff must establish a real, substantial controversy such that the statute's enforcement creates a "realistic danger of sustaining a direct injury;" although a party need not await consummation of the threatened injury, imaginative, hypothetical or speculative fears of injury are wholly insufficient to confer standing. *Id.* at 298.

While the Court has relaxed prudential standing requirements in cases raising First Amendment overbreadth claims, *see e.g., Munson*, 467 U.S. at 956-57, it has never relaxed Article III's jurisdictional case or controversy requirement. Here, the question of whether Plaintiffs have a justifiable fear of prosecution or an economic injury should never have been reached without a demonstration that at least one of them knowingly displays material considered harmful to juveniles under § 18.2-390(6) in a manner where juveniles can examine and read it carefully and thoroughly. This threshold Article III showing was neither alleged in the complaint nor demonstrated by Plaintiffs' evidence.

Although the district court found that five to twenty-five per cent of the material carried in Northern Virginia bookstores is "harmful to juveniles" (J.S. at A-20), there is nothing in the record to support this conclusion. Even the Court of Appeals,

although finding that a case or controversy existed, admitted that "there was little specific evidence presented below, making it difficult to determine what percentage of materials in a given retail outlet might be subject to the amendment's restriction." *Booksellers*, 802 F.2d at 696 (J.S. at A-9). And, what little evidence that was presented established, if anything, the lack of an actual case or controversy.

Helen Ross, testifying on behalf of Ampersand Books, introduced into evidence several books she had removed from her shelves which she believed *might* violate the display provision. Yet, she testified that she was unaware of the statutory definition of "harmful to juveniles" (J.A. 56), and Virginia certainly did not admit that the display of any of these books would violate the Amendment. Ross also said that she carried only perhaps half a shelf of books that she would not sell to juveniles, but there was no testimony or finding that these books either fell within the Amendment's ambit or were displayed where juveniles could examine and peruse them. If Ross' testimony reveals anything, it is that she would not display any material for juveniles to examine and peruse that she would not sell to them.

Carol Johnson testified on behalf of Books Unlimited, Inc. Her testimony is even more striking than Ross'. She identified and introduced into evidence eight books she had selected from her shelves which she believed violated the statute, but at least four of these books were specifically designed for her juvenile clientele. (J.A. 72-74). Her concern was simply that these materials, while appropriate for young teenagers and up, would not be appropriate for younger children. She stated that young children are "just not ready" for the narrative, and the pictures "they are just going to titter over" (J.A. 74); but material which merely causes young children "to titter" can hardly be assumed to appeal to their "prurient" interest under § 18.2-390(6). Importantly, there was no evidence that any of these books, with the obvious exception of those tailored for juveniles, were displayed where juveniles could examine and peruse them. Johnson did state that she has "some" adults-only books, but to her knowledge no juvenile has ever examined or perused them; in fact, she places these books, occupying only half a shelf in her store, where "I can keep an eye on them." (J.A. 78).

As for the Plaintiff trade associations, while they may have standing to assert claims on behalf of their Virginia members, they must first show the existence of an Article III case or controversy. *See Secretary of the State of Maryland v. J.H. Munson Co.* Yet, the associations never identified any of their Virginia members other than Ampersand Books and Books Unlimited, Inc.[1] Whoever the trade associations' other members might be, no evidence showed that they even carried "harmful to juveniles" material, much less that they displayed it in violation of the Amendment. The associations' Article III standing therefore rises no higher than that of the two Northern Virginia bookstores, which is non-existent.[2]

These Plaintiffs cannot conjure a case or controversy out of thin air where there is no credible evidence that some Plaintiff, somewhere, has previously violated, is currently violating or intends in the future to violate the Amendment by displaying "harmful to juveniles" material in a manner such that children can examine and peruse it. Plaintiffs simply failed to show a realistic chance of criminal prosecution to establish the existance of an Article III actual case or controversy. Stated another way, can there be any doubt what Plaintiffs' argument would be if they were before this Court challenging a conviction for violating the Amendment under these facts? Just as there would be no evidence to sustain such a conviction in that case, there is no evidence to establish the existence of an actual case or controversy in this one.

---

[1] The only evidence of these bookstores' membership in any trade association related to Plaintiff American Booksellers Association. There was no claim or evidence that Ampersand Books or Books Unlimited even belonged to the other Plaintiff trade associations. Indeed, Plaintiff International Periodical Distributors Association did not even allege, much less show, that it had any members located in or doing business in the Commonwealth of Virginia.

[2] In *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333 (1977), the Court held that the Apple Commission had standing to litigate the claims of its constituent members. In *Hunt*, however, the plaintiff showed injury to Washington's apple growers by the challenged statute and thus obtained standing. *Id.* at 337-38. There was no such showing here.

At best, then, it is purely conjecture that after the Amendment's passage either Plaintiff bookstore faced even a remote chance of either investigation or prosecution for continuing to do business as they had always done. In fact, the district court found in its order denying attorney fees that "actual enforcement of the statute [in the Northern Virginia area] was considerably less likely." (J.A. 84). It is true, of course, that even if Plaintiffs do not have a realistic chance of prosecution, they can still show that a case or controversy exists by establishing that the challenged provision will cause them "injury in fact." *See Munson*, 467 U.S. at 954-55. Once again, however, they can rise no higher than Ampersand Books and Books Unlimited: evidence of a credible threat of "injury in fact" must have been shown by one of these two Northern Virginia bookstores, or not at all.

Any claim of economic injury caused by compliance with the Amendment was founded only on the bookstore owners' misapprehension of what the statute requires. For example, their claims that they must review each of their books simply shows a gross misunderstanding of the Amendment's scienter requirement. *See infra* at 30-31. And their guesses as to the impact on their businesses were made in admitted ignorance of the legal standards governing the material affected. (J.A. 26, 56, 30, 82).

This Court has consistently found that objective facts, not subjective fears, of injury are required to demonstrate an Article III case or controversy. *See e.g., O'Shea v. Littleton*, 414 U.S. 488 (1974). The alleged impact of the Amendment upon Ross' and Johnson's businesses is irrational and illusory, apparently caused by how the Amendment was "explained" to them by the American Booksellers Association at the time of the Amendment's effective date. (J.A. 40-41, 69). Indeed, although it has been illegal to sell "harmful to juveniles" material for almost two decades, Johnson admitted that *the issue had never arisen*. (J.A. 58.) The only action any of these Plaintiffs has ever taken because of the Amendment is to join the lawsuit attacking it. There is no actual case or controversy for this Court to decide.

B. THIS COURT SHOULD DENY PRUDENTIAL STANDING TO THESE PLAINTIFFS

Should the Court determine that a case or controversy existed between any defendant and a particular Plaintiff, however, the issue remains as to whose rights and interests can be asserted by that Plaintiff. If either bookstore showed a controversy, the evidence is clear that at most a minuscule number of its books fall within the definition of "harmful to juveniles." The Amendment's minimal impact on these two bookstores, when weighed against Virginia's compelling interest in protecting the welfare of children, clearly demonstrates the Amendment's constitutional validity with respect to them. *See infra* at 26.

This Court has, of course, previously accorded litigants of First Amendment facial overbreadth challenges expanded prudential standing to assert the claims of others. *See Munson*, 467 U.S. at 956-58. In this respect, both lower courts here placed great emphasis upon the limitations which they believed the Amendment might place on the general public's "right of access" to material obscene for juveniles, but not for adults. This Court should balance the interests of federeal-state comity with the relaxed standing doctrine generally applicable in the First Amendment context. In the case at bar, a balancing of these competing interests weighs in favor of denying any Plaintiff prudential standing to assert the rights of others not before this Court.

The important interest in avoiding needless friction between the States and the federal government has been repeatedly recognized by this Court. *See e.g., Rizzo v. Goode*, 423 U.S. 362, 377-380 (1976). So important is the preservation of the "special delicacy of the adjustment to be preserved between federal equitable power and State administration of its own law," *Stefanelli v. Minard*, 342 U.S. 117, 120 (1951), that this Court normally refuses injunctive relief in actions challenging prospective enforcement of state criminal laws, even where the plaintiff asserts his *own* legal rights and interests. *See Wooley v. Maynard*, 430 U.S. 705, 717 (1977)(White, J., dissenting in part).

Surely the contrived preemptive strike Plaintiffs launched against the Amendment in the district court is one of the most serious attacks on State sovereignty imaginable. This problem is only exacerbated by the obvious recruitment of local Virginia

plaintiffs, without full and complete disclosure to them of the limiting effect Virginia Code § 18.2-390(6) and (7) places on the Amendment's application. The courts below, however, failed to give any weight to basic principles of federal-state comity. Instead, the district court rejected a request to abstain from deciding the issue —a course of action suggested by this Court in *Babbitt v. United Farm Workers*—and granted prohibitory injunctive relief in violation of the rule that only "exceptional circumstances" warrant federal injunctive relief against prospective, and here speculative, state prosecutions. *See Wooley*, 430 U.S. at 711-712 (finding exceptional circumstances where plaintiff had been prosecuted three times within five weeks).

The limitations placed upon the ability of a party before a federal court to litigate the rights and interests of others are "essentially matters of judicial self-governance. . . ." *Warth*, 422 U.S. at 500. This Court clearly has the authority and the power to define the scope of prudential standing allowed plaintiffs who invoke Article III jurisdiction by manufacturing an attack on state legislation in a preemptive fashion. Virginia urges this Court to determine that federal-state comity interests outweigh any interest in giving Plaintiffs expanded prudential standing, and thus reenforce the "special delicacy" of federal-state relations it has recognized in the past. *See Rizzo*, 423 U.S. at 378. Even if Plaintiffs have standing to assert the First Amendment rights of others, however, the Amendment is manifestly not facially overbroad as to either them or any party not before the Court.

II. THE AMENDMENT IS NOT FACIALLY OVERBROAD

A. INTRODUCTION

It is now axiomatic that not all speech is protected by the First Amendment. Obscene material certainly does not fall within the parameters of constitutionally protected expression. *Miller v. California*, 413 U.S. 15 (1973). Nor does material depicting sexual performances by children enjoy First Amendment protection. *New York v. Ferber*, 458 U.S. 747 (1982).

The 1985 amendment to Virginia Code § 18.2-391, like the statute as a whole, does not regulate material which is obscene as to adults. Instead, both the Amendment and the pre-existing statute are designed to protect children from exposure to sexually

explicit material which is harmful to them as defined by Virginia Code § 18.2-390. The Amendment is the progeny of *Ginsberg v. New York*.

In the spring of 1968, the Court rendered its decision in *Ginsberg*, upholding a New York law prohibiting the exposure to children of sexually explicit material which, though not obscene as to adults, was deemed to be "harmful to minors." *Ginsberg's* doctrine of "variable obscenity" is founded on the principle that the definition of obscenity may be constitutionally adjusted "to social realities by permitting the appeal of...[sexually explicit] material to be assessed in terms of the sexual interest...of...minors." 390 U.S. at 638, *quoting Mishkin v. New York*, 383 U.S 502, 509(1966). Because of the governmental interest in protecting children's welfare, it is "altogether fitting and proper for a State to include in a statute designed to regulate the sale of pornography to children special standards broader than those embodied in legislation aimed at controlling dissemination of such material to adults." 390 U.S. at 640 (citation omitted).

A State may, of course, go too far in attempting to protect children from pornography. In *Butler v. Michigan*, 352 U.S. 380 (1957), for example, the Court unanimously struck down a law making it illegal "to make available for the general reading public ... a book ... found to have a potentially deleterious influence upon youth." *Id.* at 382-83. But the *Butler* statute forbade the dissemination of non-obscene material under any circumstances if it might be harmful to children, thus reducing "the adult population of Michigan to reading only what is fit for children." *Id.* If a provision does not deny booksellers the right to provide non-obscene material to adults or deny adults ultimate access to the material, however, it is not defective under *Butler*. *See Ginsberg*, 390 U.S. at 634("[The New York statute] does not bar appellant from stocking the magazines and selling them to persons seventeen years of age or older, and therefore the conviction is not invalid under our decision in *Butler v. Michigan.*")

With *Ginsberg's* recognition of a State's legitimate and constitutional responsibility to protect children from exposure to material obscene as to them came the General Assembly of

Virginia's 1970 enactment of §§ 18.2-390 and 391; in fact, the Virginia provisions were almost verbatim copies of the New York statute validated in *Ginsberg*. Five years later, and again in accord with a decision of this Court, § 18.2-390(6)'s definition of "harmful to juveniles" was modified to comport with the standard enunciated in *Miller v. California*.

The Virginia statutes remained unchanged for some ten years. Then, in 1985, the General Assembly enacted the Amendment to § 18.2-391 under attack here. Although the Amendment may, at first glance, seem to depart somewhat from *Ginsberg* because it deals with the display of pornography, not merely its sale, the *Ginsberg* Court characterized the statute involved there as prohibiting minors' "*access*" to the material, as a regulation of "the *availability* of sexual material to minors" and as a restraint on "minors' '*exposure* to such material.' " 390 U.S. at 636, 639, 641 (emphasis added).

In addition to its holding in *Ginsberg*, this Court has made clear on several other occasions that its concern for children is not limited to just their actual purchase of sexually explicit material. In *Jacobellis v. Ohio*, 378 U.S. 184 (1964), six members of the Court agreed that a movie was not obscene, but Justice Brennan suggested for a plurality: "State and local authorities might well consider whether their objectives in this area would be better served by laws aimed specifically at preventing distribution of objectionable material to children. . . ." *Id.* at 195. In fact, the plurality cited with approval *State v. Settle*, 90 R.I. 195, 156 A.2d 921 (1959), where the Rhode Island Supreme Court upheld a statute which, although using pre-*Ginsberg* definitions, made it unlawful to commercially "show" certain sexually explicit material to children. *Id.* at 923.

In *Stanley v. Georgia*, 394 U.S. 557 (1969), the Court overturned a conviction for possessing obscene material in a private home as unconstitutional, but "approved[d] the validity of regulatory action taken to protect children . . . when obscenity is . . . displayed publicly." *United States v. Reidel*, 402 U.S. 351,

360 (1971)(Marshall, J., dissenting); *see Rabe v. Washington*, 405 U.S. 313, 317 (1971)(Burger,C.J., concurring, joined by Rehnquist,J.)(commenting favorably on laws protecting children from public display of obscene material).

Shortly thereafter, *Miller v. California* recognized that the States have a legitimate interest in "prohibiting . . . *exhibition* of obscene material when the mode of dissemination carries with it a significant danger of . . . *exposure to juveniles.*" 413 U.S. at 18-19 (emphasis added). Two years later, the Court acknowledged that society has the right to adopt more stringent controls on communicative material available to youths than on that available only to adults. *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212, 216 n.15 (1975).

In 1976, a four-member plurality of the Court, speaking through Justice Stevens, took it for granted that exposure to minors of sexually explicit material could be constitutionally prohibited, noting with some irony that:

> [T]he Members of the Court who would accord the greatest protection to [sexually explicit] material have repeatedly indicated that the State could prohibit the distribution or *exhibition* of such materials to juveniles. . . . Surely, the First Amendment does not foreclose such a prohibition.

Young v. American Mini Theatres, Inc., 427 U.S. 50, 69-70 (1976) (emphasis added). And, once more in 1978, the Court held that adult access to non-obscene, but sexually explicit, material can be limited in some circumstances in order to insulate minors' exposure to its effects. *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978). It can hardly be said, then, that Virginia's 1985 display provision sprang from untilled constitutional soil.

B. FACIAL OVERBREADTH: THE STANDARD

When one undertakes a First Amendment facial challenge to a statute, he claims, as do the Plaintiffs here, that it is invalid in all its applications: "A 'facial' challenge . . . means a claim that the law is 'invalid—and therefore incapable of any valid application.'" *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 n.5 (1982) (citation omitted); *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, ___, 105 S.Ct. 2794, 2802-03, 86 L.Ed.2d 394, 407 (1985).

Facial invalidation, however, is not the usual or desired method of dealing with a State statute: "Application of the overbreadth doctrine in this manner is, manifestly, strong medicine. It has been employed by the Court sparingly and only as a last resort." *Broadrick v. Oklahoma*, 413 U.S. 601, 613-14 (1973). Indeed, this Court has "'never found that a statute could be facially invalid merely because it is possible to conceive of a single impermissible application. ...'" *Ferber*, 458 U.S. at 772 (citation omitted.)

Although a statute's chilling effect on third parties' First Amendment rights can be considered in an overbreadth analysis, *substantial* overbreadth remains the rule. The State's interest in enforcing its own statutes must be weighed against this potential "chilling effect," and this interest prevails unless the "overbreadth of a statute [is] not only . . . real, but *substantial* as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick*, 413 U.S. at 615 (emphasis added).

This "substantiality" requirement is even greater where the statute deals with obscenity or, as here, with non-obscene material with less than absolute First Amendment protection, material falling only "in the shadow of the First Amendment." *See Broadrick*, 413 U.S. at 614-15.[3] The Court's "decisions have displayed a greater willingness to permit content-based restrictions when the expression at issue fell within certain special and limited categories." *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 65 n.7 (1983), *citing Miller v. California*. And it does not matter that the challenged regulation applies to pure speech rather than conduct: *substantial* overbreadth is still required. *Ferber*, 458 U.S. at 772; *Brockett*, 472 U.S. at ___, 86 L.Ed.2d at 406 n.12.

Not only must there be substantial overbreadth, but there must also be no narrowing construction readily available to the State courts: "[A] state statute should not be deemed facially invalid unless it is not readily subject to a narrowing construction by the state courts. . . ." *Erznoznik v. City of Jacksonville*, 422 U.S. at 216 (citation omitted). "Facial overbreadth has not been invoked

---

[3]Harmful to juveniles material is "likely to be on the 'borderline between pornography and artistic expression' since to be subject to the [provision] the material must be obscene at least as to children." *Upper Midwest Booksellers v. City of Minneapolis*, 780 F.2d 1389, 1396 (8th Cir. 1985).

when a limiting construction has been or *could* be placed on the challenged statute." *Broadrick*, 413 U.S. at 613-614 (emphasis added). This is because, "[w]hile a sweeping statute, or one incapable of limitation, has the potential to repeatedly still the exercise of expressive activity by many individuals, the extent of deterrence of protected speech can be expected to decrease with the declining reach of the regulation." *Ferber*, 458 U.S. at 772.

The mere possibility of an unconstitutional application is not a basis for facial invalidation. The meanings of all words—except perhaps technical scientific terms—encompass ambiguities: "Words inevitably contain germs of uncertainty." *Broadrick*, 413 U.S. at 608. Just because a statute "may be susceptible of some other improper applications," facial invalidation is not required. *Id.* at 618.

Finally, State statutes should not be facially stricken where case-by-case review can obviate difficulties in construction. As the *Broadrick* Court said:

> It is our view that [the statute] is not substantially overbroad and that whatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied.

413 U.S. at 615-16. Or, as stated somewhat differently in *Flipside*, " '[a]lthough it is possible that specific future applications . . . may engender concrete problems of constitutional dimension, it will be time enough to consider any such problems when they arise.' " 455 U.S. at 504 (citation omitted).

C. FACIAL OVERBREADTH: APPLICATION TO THE AMENDMENT

Under the guiding principles of the First Amendment facial overbreadth analysis, the Court of Appeals' facial invalidation of the Amendment was clearly erroneous: the Amendment serves a compelling State interest; it does not have a real and substantial deterrent effect on legitimate expression; and, if necessary, narrowing constructions of the Amendment are readily available.

1. The Amendment Serves Compelling State Interests

This Court has consistently recognized that a State has two weighty interests in protecting the welfare of minors by prohibiting their exposure to pornography. In *Ginsberg*, the Court acknowledged "'society's *transcendent* interest in protecting the welfare of children.'" 390 U.S. at 640 (citation omitted)(emphasis added). The States also have an equal, but independent, interest in protecting parents' right "to direct the rearing of their children", which "is basic in the structure of our society." *Id.* at 639.

The States have similarly recognized their strong interests in this area and have acted accordingly: forty-eight States have laws regulating minors' access to pornographic material. (Georgia Brief—Appendix A). So too have numerous localities enacted such provisions, including the cities of Minneapolis and Wichita. *See Upper Midwest Booksellers v. City of Minneapolis; M.S. News v. Casado*, 721 F.2d 1281 (10th Cir. 1983).

Lay commentators have likewise discerned and supported these State interests. As the *Minneapolis Star and Tribune* editorially commented with respect to the display provision enacted by the City of Minneapolis and upheld by the Eighth Circuit in *Upper Midwest:*

> Minneapolis residents may differ about whether adults should be free to buy pornography, but most concur that children shouldn't be exposed to it.
>
> * * *
>
> [Minneapolis' display provision] achieves two desirable ends: controlling pornography's troubling side-effects while leaving adults free to sell, buy and read whatever they like.

Minneapolis Star and Tribune, January 6, 1986, at 10A. (Appellant's Lodging at 84).

As this Court stated in *Ferber:* "It is evident beyond the need for elaboration that a State's interest in 'safeguarding the physical and psychological well-being of a minor' is '*compelling*.'" 458 U.S. at 756-57 (citation omitted)(emphasis added). Virginia's display provision serves this same compelling interest. Indeed, "what value would a statute restricting only sales have if minors

can still peruse and examine the materials?" Comment, *See No Evil: The Divisive Issue of Minors' Access Laws*, 17 Cumb. L. Rev _____ (1987) (Appellant's Lodging at 33-34).[4] Quite obviously, the answer is none: "the regulation of sales without control over commercial displays of materials deemed harmful to minors would render" meaningless the protective efforts constitutionally validated by this Court in *Ginsberg*. *See American Booksellers Association, Inc. v. Rendell*, 322 Pa. Super. 537, 481 A.2d 919, 942 (1984).

The courts below acknowledged this interest, but nonetheless concluded that it cannot withstand the Amendment's perceived overbreadth.[5] To the contrary, the Amendment strikes a reasonable balance between protected First Amendment rights on the one hand and Virginia's admittedly legitimate interest in protecting its children from pornography on the other.

2. The Amendment Does Not Substantially Deter Protected Expression

Broadrick v. Oklahoma brought the overbreadth doctrine into clear focus. The *Broadrick* Court emphasized that the function of an overbreadth challenge—to guard against inhibitions on free speech—weakens as you move from speech toward conduct without any speech. Mindful that the only rationale for the existence of the First Amendment overbreadth doctrine is to quell the "chilling effect" on protected speech, *Broadrick* reasoned that, although a statute may inhibit such speech "to some unknown extent, there comes a point where that effect—at best a prediction—cannot, with confidence, justify invalidating a statute on its face and so prohibiting a State from enforcing the statute against conduct that is admittedly within its power to proscribe." 413 U.S. at 615.

---

[4]A draft copy of this law review article has been lodged with the Court in the Appellant's Lodging. It will be published in June 1987 under this citation.

[5]The district court acknowledged that the Amendment's purpose serves a substantial governmental interest, going so far as to characterize Virginia's interest as "praiseworthy." *Strobel*, 617 F. Supp. at 705 (J.S. at A-28, A-26). The Fourth Circuit made a similar admission: "There is no question that a state government has an interest in shielding minors from some sexually explicit materials which are not considered obscene as to adults." *Booksellers*, 802 F.2d at 694 (J.S. at A-6).

In *New York v. Ferber*, this Court upheld a New York child pornography statute, despite its admitted potential overbreadth, because the protection of children from pornography is a special and particular area of State concern. The Court found the State's interest "compelling," justifying "special treatment." 458 U.S. at 757. In such a case of overriding State interest—there, as here, the protection of children—"the balance of competing interests is clearly struck" and the statute survives. *Id.* at 764.

The Fourth Circuit should have reached the same result here. Instead, the court voided Virginia's display provision because the Amendment supposedly unreasonably limits adult access to sexually explicit material and significantly interferes with booksellers' business practices. Yet the court acknowledged that"[t]here was little specific evidence below, making it difficult to determine what percentage of materials in a given retail outlet might be subject to the amendment's restrictions." *Booksellers*, 802 F.2d at 696 (J.S. at A-10). The Court of Appeals simply *assumed* that book retailers face a substantial problem, stating: "It cannot be gainsaid, however, that book retailers face a substantial problem attempting to comply with the amendment in ordering, reviewing, and displaying publications for sale." *Id.* at 696 (J.S. at A-9). This assumption flies in the face of both the Plaintiffs' own evidence and the legal principles involved.

The Amendment, like the pre-existing statute, does not in any way prohibit the continued sale of affected material to adults: it simply requires that the material not be displayed where juveniles can examine and peruse it. In *Erznoznik v. City of Jacksonville*, the Court reviewed an ordinance prohibiting drive-in movie theatres from showing films containing nudity when the screen is visible from a public street or place. While the ordinance was found to be facially overbroad because it proscribed nudity that was not obscene even as to children, the Court suggested that the ordinance would have been valid if limited to movies that are obscene for minors.[6]

---

[6]"The only narrowing construction which occurs to us would be to limit the ordinance to movies that are obscene as to minors." 422 U.S. at 216 n. 15. None of the defendants, however, had suggested such a construction.

In another context, the Court has found that *how* First Amendment protected speech is "displayed" to the public can be legitimately regulated. In *FCC v. Pacifica Foundation*, the FCC sought not to ban public broadcasts of indecent, but non-obscene language, but to "channel it to times of day when children most likely would not be exposed to it." 438 U.S. at 733. The question presented was whether the public broadcast of such language could ever be restricted because of its content. Noting that "[b]ookstores . . . may be prohibited from making indecent material available to children," the Court found the FCC regulation permissible. *Id.* at 749, *citing Ginsberg*.

Similarly, in *Interstate Circuit v. Dallas*, 390 U.S. 676 (1968), the Court considered the constitutionality of a Dallas ordinance prohibiting the showing to children of films having material "not suitable for young persons." Although invalidating the Dallas provision because of its vagueness in describing the material within its ambit, the Court, again citing *Ginsberg*, pointed out "that because of its strong and abiding interest in youth, a State may regulate the *dissemination* to juveniles of, and their *access* to, material objectionable as to them, but which the State clearly could not regulate as to adults." *Id.* at 690 (emphasis added).

It is beyond question, then, that provisions regulating the display of material obscene as to minors do not inherently deter protected expression in a real and substantial fashion. And Plaintiffs' evidence certainly does not establish such an impact here, where their own witnesses either did not know what Virginia's definition of "harmful to juveniles" meant or disagreed with it in principle.

a. Retailers' Ability To Operate Is Not Impaired

It must be remembered that retail booksellers are merely commercial vendors of any potential message: like the theatres in *American Mini Theatres*, "[t]hey do not profess to convey their own personal messages through the [materials], so that the only communication involved is that contained in the [materials] themselves." 427 U.S. at 78 n.2. Moreover, as in *Ferber*, "it could reasonably be argued that the bookseller, with an economic incentive to sell materials that may fall within the statute's scope,

may be less likely to be deterred than the employee [in *Broadrick*] who wishes to engage in political campaign activity." 458 U.S. at 772. After all, retailers have only an "attenuated interest in displaying and marketing merchandise in the manner that the retailer desires." *Flipside*, 455 U.S. at 496.

This is particularly true here, given the minute, if any, amount of material shown to be affected by the Amendment. Helen Ross stated in her affidavit that she did not know the meaning of the term "harmful" in the Amendment's context. (J.A. 26). Then, when she testified, she reiterated that she did not know the legal definition of "harmful to juveniles." (J.A. 56). In a similar vein, Heather Florence merely had a complaint with the definition of "harmful to juveniles" which, according to her, was too vague to determine which material might fall within its ambit. (J.A. 61). Yet this "vague" definition was the same one found constitutionally sufficient by this Court nineteen years ago in *Ginsberg*.

As for Carol Johnson, her affidavit stated concern about the meaning of the terms "harmful" and "sexual conduct," although both are defined under Virginia law as in *Ginsberg*, and wondered who would determine their meaning. (J.A. 30). She then admitted at the hearing that she had never read the definition of "harmful to juveniles;" in fact, she was not even aware that Virginia law defined that term. (J.A. 82).

Consequently, although Ross and Johnson attempted to guess which, if any, books "might" be affected by the Amendment, they had absolutely no framework for doing so. Simply put, their evidence was presented in a legal vacuum and should have been ignored by both the district court and the Court of Appeals.[7]

Even if this pervasive defect in Ross' and Johnson's testimony is ignored, their evidence still fails to support a finding that the Amendment has a *real* and *substantial* deterrent effect on a retail bookseller's ability to operate. For example, while Johnson testified that the Amendment would have a "tremendous impact"

---

[7]Virginia objected to this testimony because it was not based on a knowledge of Virginia law, but merely on what Ross, Johnson and Florence subjectively, and wrongly, thought the law to be. The objection was overruled. (J.A. 43).

on her business, she could name only *one* book, *The Joy of Sex*, that might appeal predominantly to the prurient interest of juveniles. (J.A. 77). When asked what percentage of her stock she regarded as "adults only" books, she only mentioned a series of books by anonymous authors, all of which were already grouped together on a half of a shelf in her store. Even then, she admitted that she does not now sell these books to children and that no minor had ever come into her store, picked one up and leafed through it. (J.A. 78, 82). Johnson adduced several books as exhibits, but she did not think they were harmful to children: she just thought the Amendment might cover them because she did not know the definition of "harmful to juveniles." (J.A. 74). Johnson did mention Judy Blume's *Forever* as a book which she had refused to sell to some juveniles she thought too young for it, but she thought it appropriate for older juveniles. (J.A. 67, 81).

Helen Ross thought that the Amendment might affect thirty to fifty per cent of her inventory, but she reached this estimate in admitted ignorance of the applicable legal standards. Indeed, she even believed that the Amendment proscribes a simple depiction of human nudity (J.A. 50), which of course is not true either for adults, *Jenkins v. Georgia*, 418 U.S. 153, 161 (1974), or for juveniles. *Freeman v. Virginia*, 223 Va. 301, 311, 288 S.E.2d 461, 466 (1982). When asked to apply the legal definition of "harmful to juveniles" to the exhibits she had submitted into evidence, Ross did not believe that any of them fell within the definition. (J.A. 53) When asked which of her books she had ever refused to sell to a juvenile, Ross said that *the matter had never arisen*. (J.A. at 58). Yet the definition of "harmful to juveniles" and the bar to the sale of such material to children has been a part of Virginia's statutory scheme for years.

In fact, there is no reason to believe that any of Ross' and Johnson's exhibits would be affected by the Amendment; certainly neither court below made such a finding. For instance, one of Plaintiffs' prime exhibits is *The Penguin Book of Love Poetry*, an anthology of poems on human affection. It includes, among other poems, works by Elizabeth Barrett Browning, William Shakespeare, Robert Burns, Robert Browning, and John Milton. Yet, because of two erotic poems on pages 107 and 112 and the book's cover showing a mildly erotic detail from an

allegorical painting by Bronzino displayed in the National Gallery in London. Plaintiffs purported to fear that a court would conclude that this book (1) predominantly appealed to the prurient interest of juveniles, (2) is patently offensive to prevailing standards in the adult community with respect to what is suitable matter for juveniles, and (3) is, when taken as a whole, lacking in serious literary, artistic, political or scientific value for juveniles. *See* Virginia Code § 18.2-390(6). Such a concern, even if truly held by retail booksellers, is simply too irrational to be a judicially cognizable basis for assuming that they have a "substantial problem" in complying with the Amendment as the Fourth Circuit assumed. This exhibit is a good example of Plaintiffs' uninformed and overblown reaction to the Amendment and symbolizes their entire case.

But, even assuming that every one of Ross' and Johnson's sixteen exhibits would be affected by Virginia's display provision, they would constitute only a minuscule fraction of their stores' combined inventory of thirty to thirty-five thousand titles (J.A. 37-38, 68), an impact manifestly insufficient to establish that the Amendment's deterrent effect on a bookseller's ability to operate is both *real* and *substantial*. *See American Mini Theatres*, 427 U.S. at 78 (Powell, J., concurring)(an incidental and minimal impact on the distribution of regulated material does not infringe on the First Amendment).

An inquiry for First Amendment purposes does not involve economic impact; it looks only to the challenged provision's effect upon freedom of expression. *American Mini Theatres*, 427 U.S. at 78 (Powell, J., concurring). Even so, Virginia suggested several ways that a retail bookseller could comply with the Amendment without significantly interfering with its business practices: the bookseller could place materials behind so-called "blinders," in wrappers preventing perusal or in "adult only" racks. Even easier, perhaps, warning tags could be placed on the materials in question or they could be color coded. And this is particularly true here given the small number of works that might be affected.[8]

---

[8]Although Ross and Johnson testified that the methods of compliance suggested by Virginia would be too burdensome and expensive, their conclusions were made in admitted ignorance of the law, thus leading them to assume a much greater amount of affected material than is actually the case.

The Court of Appeals rejected each of Virginia's suggested methods of compliance, but the court's reasons highlight its misperception of the legal principles involved. For example, the court rejected the use of "adults only" tags or displaying the restricted material behind "blinders" as ineffectual because these steps would not stop any "determined juvenile from examining and perusing the materials." But this is the same as finding that a bookseller could be prosecuted because a juvenile might break into his store in the middle of the night and examine and peruse regulated material; yet the Amendment only proscribes the *knowing* display of restricted material where juveniles can examine and peruse it. This scienter element allows a bookseller to comply by simply making an effort, by any reasonable means, to restrict the material from children. The inclusion of a scienter requirement is a recognition that " 'it is not innocent but calculated purveyance of filth which is exorcised.' " *Hamling v. United States*, 418 U.S. 87, 123-124 (1974) (citation omitted).

The Fourth Circuit's misunderstanding of the scienter requirement is further highlighted by its rejection of Virginia's assertion that this element allows the bookseller to avoid the hazards of self-censorship and its contrary finding that Virginia's suggested methods of compliance would require a bookseller to actually "read and make a content based judgement on each item on his shelves in order to select the ones requiring special treatment." *Booksellers*, 802 F.2d at 696 (J.S. at A-10). This is no more true of the Amendment than of the statue in *Ginsburg*, where this Court accepted that the scienter element " 'indicates that only those who are *in some manner aware of the character of the material* they attempt to distribute should be punished.' " 390 U.S. at 644 (citation omitted) (emphasis in original). As the Virginia Supreme Court recognizes, a bookseller is culpable only if he is aware of the contents of the material. *Freeman*, 223 Va. at 311, 288 S.E.2d at 486.

Laws such as the Amendment plainly do not charge booksellers with actual awareness of the contents of every book and magazine in their store. *See Rendell*, 481 A.2d at 939-940. The scienter element means that a bookseller only has to take measures to comply with the Amendment after he is aware or has

reason to know of an affected work's contents. This requirement relieves him of the affirmative duty of reviewing all his material in advance. *Cf. Smith v. California*, 361 U.S. 147, 153 (1959) (finding an obscenity statute unconstitutional because it lacked any scienter requirement).

b. Adult Access is Not Deterred

Not only does the Amendment have no substantial deterrence on a bookseller's ability to operate, adult access to protected material is, at most, only minimally affected by the modes of compliance suggested by Virginia. In *M.S. News*, the Tenth Circuit considered a Wichita ordinance making it unlawful to knowingly display harmful to minors material unless it is placed behind "blinder racks" so that the lower two-thirds of the material is not exposed to view. Finding the Wichita regulation permissible, the court stated:

> [T]he proscription on display of material harmful to minors does not unreasonably restrict adults' access to material which is not obscene as to them. The ordinance permits the 'display' of material harmful to minors if it is in blinder racks which conceal the lower two-thirds of the material. Thus, adults may still have some access to materials not obscene as to them, and they may purchase such material.

721 F.2d at 1288-89. Similarly, in *Rendell* the appellate court upheld a minors' access law similar to the Amendment, concluding:

> [A]lthough adults may be inconvenienced in their perusal or purchase of graphic materials harmful to minors, though not obscene for adults, adult access to these materials will not be significantly impaired. In addition. . . any inhibitory effect on dissemination to adults does not render the display provision constitutionally defective, given the State's legitimate interest in shielding children from these materials.

481 A.2d at 941.

More recently, the Eighth Circuit has validated a Minneapolis display provision even more restrictive than Virginia's. There, the complained of portion of the ordinance made it illegal to display harmful to minors material where minors might be present and able to see it unless it was at all times kept in a sealed wrapper. The court nevertheless found that the provision did not have a substantial impact on adult rights:

> Any burden here is the result of the permissible regulation of material that is obscene as to minors. The restriction in relation to adults is merely an incidental effect of the permissible regulation and is minimal in its impact. Adults are still free to request a copy of restricted material to view from a merchant or. . . in segregated sections of ordinary retail establishments. More significantly, adults are still able to view any of the material in a free and unfettered fashion by purchasing it.

Upper Midwest, 780 F.2d at 1395.

The court below concluded that, for a "variety of reasons," many adults would be deterred from exercising their rights, but made no attempt to explain what these reasons might be. *Booksellers*, 802 F.2d at 696 (J.S. at A-10). To the contrary, the Amendment manifestly does not prohibit adults from purchasing affected material, and it is this ultimate access that differentiates the Amendment from the statute found unconstitutional in *Butler v. Michigan*: absolutely barring restricted material from a bookstore so as to reduce the reading level of adults to that of children is one thing; providing adults ultimate access to the material by only prohibiting its manner of display where a minor can read or examine it in detail is quite obviously another, *See M.S. News*, 721 F.2d at 1288 n.12; *Upper Midwest*, 780 F.2d at 1395-96.

c. "Older Minors' " Access: A Non-issue

In dictum, the Fourth Circuit also questioned whether an "older minor's " First Amendment rights can be restricted by the standards applicable to younger minors. The court's concern was founded on its belief that the pre-Amendment statute allowed retailers to consider a minor's relative maturity in deciding whether to sell a particular item to him, while the display

provision could not be so selectively applied. *Booksellers*,802 F.2d at 695 n.7 (J.S. at A-7). The district court never addressed this issue, and the Court of Appeals' emphasis on a retailer's ability to determine what material might be harmful for one child, but not another, is wholly misplaced.

A bookseller's scienter—whether in the context of Virginia's harmful to juveniles provision or in that of adult obscenity statutes—does not depend upon her subjective belief as to what is or is not restricted. The scienter requirement is satisfied if the bookseller is aware of the nature of the material, even if she did not personally believe it proscribed:

> It is constitutionally sufficient that the prosecution show that a defendant had knowledge of the contents of the materials. . . and that he knew the character and nature of the materials. To require proof of a defendant's knowledge of the legal status of the materials would permit the defendant to avoid prosecution by simply claiming that he had not brushed up on the law. Such a formulation of the scienter requirement is required neither by the language of [the statute] nor by the Constitution.

Hamling, 418 U.S. at 123-24

Moreover, material is only "harmful for juveniles" if it "is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for juveniles." Virginia Code § 18.2-390(6). The determination of what is obscene for juveniles is no more based on what is fit for young juveniles than the adult obscenity standard turns on what is obscene for young adults. As the Supreme Court of Virginia stated in rejecting this same argument in the context of a similar statute: "It may be true that what is obscene for one child is not obscene for another. But. . . there is no constitutional requirement that all members of a defined class have the same levels of maturity or sensitivity or hold the same views." *Freeman*, 223 Va. at 312, 288 S.E.2d at 467, *citing Pinkus v. United States*, 436 U.S. 293 (1978)(community standard for judging adult obscenity does not focus on its most susceptible or sensitive members).

The same contention has been raised by the principal Plaintiff here in other cases and has been uniformly rejected. In *Rendell*, for example, the court stated: "[T]he legislature has consistently viewed minors as a generic class, as has the judiciary. More importantly, any criteria utilized must be objective. . . Thus, a complete enumeration of degrees of harmfulness, calibrated to correspond to varying levels of intellectual and emotional growth, would frustrate the legislative objective." 481 A.2d at 938. Or, as the district court observed in *American Booksellers Ass'n v. Webb*:

> The Court notes that a single standard of obscenity also is applicable to all adults, but the Court is not aware of any serious argument that such a standard is overbroad because it relegates more mature adults to reading or viewing only those materials that are appropriate for immature nineteen-year olds.

590 F. Supp. 677, 690 (N.D. Ga. 1984).

Variable obscenity statutes do not invade the area of free expression constitutionally secured to minors. *Ginsberg*, 390 U.S. at 637. And, except to the extent that the Fourth Circuit's unwarranted concern for "older minors" distorted its perception of the Amendment, the court's dictum is simply a non-issue in this case.

3. Narrowing Constructions Are Readily Available

Even if the Amendment deterred protected expression in a real and substantial manner, the Fourth Circuit's facial invalidation still was not justified unless no narrowing constructions were readily available. *Erznoznik*, 422 U.S. at 216. Facial overbreadth should not be invoked when a limiting construction *can* be placed on the challenged statute. *See Broadrick*, 413 U.S. at 613. This requirement is not unusual, of course, the general rule being that, if a state law is susceptible of an interpretation supporting its constitutionality, a federal court must accord the law such meaning. *See Screws v. United States*, 325 U.S. 91, 98 (1943)(pluralilty opinion). Or, as the Fifth Circuit has aptly stated:

> Where a state statute, not yet construed by the state courts, is susceptible of one construction that would leave it free of constututional infirmity and of another construction that might not, then the district court should not place itself in the position of holding a statute unconstitutional by giving it the latter construction only to discover that the state courts would give it the former.

Ziegler v. Ziegler, 632 F.2d 535, 538 (5th Cir. 1980).

The mere possibility of an unconstitutional application is not a basis for facial overbreadth invalidation: "It is difficult to think of a law that is utterly devoid of potential for unconstitutionality in some conceivable application." *Ferber*, 458 U.S. at 772 n.27. So it was that this Court upheld the facial validity of State laws in *Broadrick* and *Ferber* which admittedly could be susceptible to some improper application. 413 U.S. at 618; 458 U.S. at 773. As Justice Marshall stated for the Court in rejecting a First Amendment overbreadth challenge to an anti-noise provision: "It is possible, of course, that there will be unconstitutional applications, but that is not a matter which presently concerns us." *Grayned v. City of Rockford*, 408 U.S. 104, 121 n.50 (1972).

Despite such admonitions, the Fourth Circuit turned the rule on its head by assuming the broadest possible meaning of the Amendment without even considering the provision's own narrowing terms. For instance, the term "display" as used in the Amendment is restricted by the provision's own words: not every display of harmful to juveniles material is made illegal; only displays that permit children to *examine and peruse* such material are proscribed.[9] Yet the court below never even considered this restrictive language.

---

[9]The *American Heritage Dictionary* 456 (2nd College Ed. 1982) defines "examine" as "[t]o inspect in detail *** [t]o observe or analyze carefully." Similarly, "peruse" means "[t]o read or examine, especially with great care." *Id.* at 979.

Perhaps the lower court's most critical error, however, was its equation of the term "may" with "conceivable," reading "may" literally so as to mean that, if a child *might* examine the pornography by any means, then it would be "displayed" within the context of the Amendment. *Booksellers*, 802 F.2d at 896 (J.S. at A-10.) But the word "may", when used as an auxiliary verb as here,[10] is susceptible to several meanings: while it can mean mere possibility as the Fourth Circuit assumed, it can just as easily mean expectancy, reasonable certainty or actual tendency. *See Corn Products Ref. Co. v. FTC*, 324 U.S. 726, 738 (1945); *Greyhound Corp. v. Excess Insurance Co. of America*, 233 F.2d 630, 634 (5th Cir. 1956). As with most words, the context of "may" is all important. *Id.* And it is clear from the context of the Amendment that it is the latter and much narrower meaning of "may" that is consistent with the legislative intent behind the Amendment, not the Court of Appeals' assumption of the former, broader meaning.

The legislative reasoning behind the Amendment is easily discernible: it is manifestly *not* intended to deny adults ultimate access to protected material or to stop merchants from selling it; rather, because proscribing the sale or loan of "harmful to juveniles" material to children is constitutionally permissible under *Ginsberg*, it is irrational, indeed absurd, to allow the display of this very *same* material so that children can peruse and examine it at their leisure, regardless of whether they eventually buy or borrow it. *See Rendell*, 481 A2d at 942.

The narrow meanings of the Amendment's terms are perfectly consistent with this legislative intent, especially since Virginia law requires that criminal laws be strictly construed against the prosecution. *See Commonwealth v. Ellett*, 174 Va. 403, 4 S.E.2d 762 (1939). And a Virginia court can and will narrow a statute's language, if necessary, without "rewriting" it in order to save its constitutionality. *See e.g., Price* v. *Commonwealth*, 214 Va. 490, 201 S.E.2d 798, *cert. denied*, 419 U.S. 902 (1974)(Supreme

---

[10] "It shall be unlawful for any person knowingly to sell or loan to a juvenile, or to knowingly display for commercial purpose in a manner whereby juveniles *may* examine and peruse [harmful to juveniles material]." Virginia Code § 18.2-391 (a) (emphasis added).

Court of Virginia narrowed definition of obscenity by judicial construction); *see also Shuttlesworth* v. *Birmingham*, 382 U.S. 87, 90-91 (1965)(although the literal reading of the statute might well have made it overbroad, the State appellate court had considerably narrowed its scope by judicial construction). The Court of Appeals should have found that a Virginia court could narrowly construe the Amendment. *See New York v. Ferber; Broadrick v. Oklahoma.*

That the Fourth Circuit's expansive reading of the Amendment's language flies in the face of a facial overbreadth analysis and distorted the court's perception of the Amendment's potential for overbreadth is readily apparent in its rejection of Virginia's suggested modes of compliance with the provision. The court placed great emphasis on the Amendment's failure to provide specific methods of compliance, concluding that a retailer cannot tell which methods of display might be lawful or unlawful. *Booksellers*, 802 F.2d at 696. But this Court found in *Flipside* that such an argument confuses the vagueness and overbreadth doctrines, stating:

> If Flipside is objecting that it cannot determine whether the ordinance regulates items with some lawful uses, then it is complaining of vagueness. *We find that claim unpersuasive in this pre-enforcement facial challenge.*

455 U.S. at 497 n.9 (emphasis added). So long as it is clear what a display statute makes illegal, the provision need not spell out what a retailer must do to comply with it. This is left to the business policies the retailer chooses to adopt. *See Capitol News Co., Inc.* v. *Metro Gov't, etc.*, 562 S.W. 2d 430, 433 (Tenn. 1978).

Although the Fourth Circuit expressed concern over the Amendment's lack of express methods of compliance, it also found that including specific modes of compliance could not save an "offensive 'display' provision." 802 F.2d at 695 n.8 (J.S. at A-9). This paradox is a clear indication that the panel simply viewed any display provision as unconstitutional *per se* and puts its facial overbreadth finding in proper perspective.

D. THE AMENDMENT IS A VALID TIME, PLACE AND MANNER REGULATION

Virginia argued below that the Amendment is a valid time, place and manner regulation akin to that in *American Mini Theatres*. The Court of Appeals rejected this contention, finding that a "private" bookstore differs from a "public" place, and that time, place and manner regulations cannot involve the content of the regulated speech. 802 F.2d at 695 (J.S. at A-8). Neither of the court's conclusions is valid.

The first distinction is easily disposed of: while a bookstore might be privately owned, it is still open to the public; a bookstore is no more "private" than the theatres in *American Mini Theatres* or *Renton v. Playtime Theatres, Inc.*, ___ U.S. ___, 106 S. Ct. 925, 89 L.Ed2d 29 (1986).

With regard to the lower court's second point, of course it is true that the Amendment involves the "content of the regulated speech" in the sense that to be subject to the Amendment's requirements the material's content must be "harmful to juveniles." But this is no different than the theatres in *Playtime Theatres* being subject to Renton's ordinance because of the content of the movies they showed. The point is that the Amendment does not attempt to regulate the content of the speech: it simply requires that the speech be displayed in a manner so as to avoid harming children. In *American Mini Theatres*, Justice Stevens stated for the plurality that the First Amendment does not foreclose a State's right to prohibit the exhibition of pornographic material to juveniles, even though it is "clear that any such prohibition must rest squarely on an appraisal of the content of material otherwise within a constitutionally protected area." 427 U.S. at 69-70.

Contrary to the Fourth Circuit's analysis, the appropriate inquiry is "whether [the provision] is designed to serve a substantial governmental interest and allows for reasonable alternative avenues of communication." *Playtime Theatres*, ___ U.S. at ___, 106 S.Ct. at 930, 89 L.Ed2d at 39. The Amendment clearly satisfies both parts of this test: as previously discussed, minors' access laws admittedly serve legitimate and compelling state interests; and Virginia's display provision leaves open ample alternative channels of communication. Compliance with the Amendment would not affect ultimate adult access to

materials obscene for juveniles, and any effect on adult speech is unintended and minimal. Indeed Virginia's display provision is less intrusive than the ordinances involved in *Playtime Theatres* and *American Mini Theatres* because any speech it affects is limited to a specific and circumscribed form of pornography.

In his *American Mini Theatres* concurrence, Justice Powell stated: "We have here merely a decision by the city to treat certain movie theatres differently because they have markedly different effects upon their surroundings. ..." 427 U.S. at 82 n.6. The same is true of the Amendment: the Court has here merely a decision by the General Assembly of Virginia to treat the display of certain material differently because of its recognized harmful effects upon children. Virginia's display provision is just as valid a time, manner and place provision as the ordinances upheld by this Court in *American Mini Theatres* and *Playtime Theatres*.

CONCLUSION

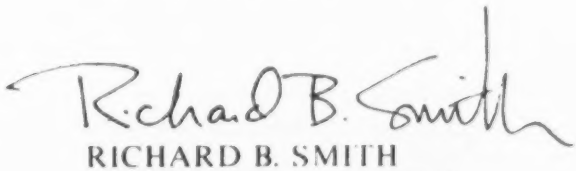
Virginia's 1985 juvenile access amendment clearly serves compelling State interests. It is not substantially overbroad on its face, sweeping no absolutely protected expression within its ambit. Even if it were, narrowing constructions are readily available to Virginia courts if the need ever arises. Given the Plaintiffs' contrived, preemptive attack on this legitimate statute without the existence of an actual case or controversy, the facial invalidation of this important provision would be, as this Court said in *Ferber*, "draconian indeed." 458 U.S. at 772 n.27.

This court recently quoted with approval Justice Powell's observation in *American Mini Theatres* that, "even if this were a case involving a special governmental response to the content of one type of movie, it is possible that the result would be supported by a line of cases recognizing that the government can tailor its reaction to different types of speech according to the

degree to which its special and overriding interests are implicated." *Playtime Theatres*, ____ U.S. at ____, 106 S. Ct. at 930, 89 L.Ed.2d at 39. *Ginsberg v. New York* was one such case. Surely, this is another. The judgment of the United States Court of Appeals for the Fourth Circuit should be reversed.

Respectfully submitted,

MARY SUE TERRY
Attorney General of Virginia



RICHARD B. SMITH
Assistant Attorney General

MARK R. DAVIS
Assistant Attorney General

April 20, 1987